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NTSB Order No. EA-4274

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of November, 1994

ROBERT SCOTT, JR., Applicant,	)	
v.	)	
DAVID R. HINSON, Administrator, Federal Aviation Administration, Respondent.	)	Docket No. 186-EAJA-SE-11778

OPINION AND ORDER

Applicant (also termed respondent) appeals the law judge's denial of his EAJA[1] application. The law judge held that no EAJA fees could be recovered because the Administrator had been substantially justified in pursuing his complaint.[2] We disagree, and remand this case for a determination of fees and expenses.

[1]Equal Access to Justice Act, 5 U.S.C. 504.

[2]A copy of the law judge's initial decision is attached.

Respondent was the pilot-in-command of Hawaiian Air's Flight 840 on July 8, 1988. The charter DC-8 departed from Honolulu International Airport destined for Frankfurt, Germany. Approximately 200 miles out, while the aircraft was still in contact with Honolulu air traffic control (ATC), ATC contacted respondent and informed him that Hawaiian Air's dispatch was directing him to return immediately to Honolulu. After initiating the turn-around, respondent contacted his dispatcher for further details, but was unable to obtain any more information than that the request had come from maintenance. Respondent and his crew analyzed the implications of an overweight landing vis-a-vis fuel dumping,[3] and they chose to land overweight, rather than to dump fuel, which had its own risks, including an additional delay in landing. Thus, when the aircraft landed in Honolulu, it was approximately 30,000 lbs. above its maximum landing weight. After landing, respondent complied with all required reporting of the incident.

In his complaint, the Administrator charged that respondent had violated § 91.31(a) because, in landing the aircraft overweight, he had failed to operate the aircraft in accordance with its manual.[4] Respondent did not disagree that his overweight landing violated the aircraft's manual. Nevertheless,

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[3]See NTSB Order EA-4003 at 8. The Administrator did not charge that this analysis was faulty.

[4]Respondent was also charged with violating § 91.9, prohibiting careless or reckless actions endangering life or property of another.

he argued, and the parties agreed, that the pilot-in-command had leeway to deviate from the manual in the event of an emergency. Respondent argued that an emergency had existed (i.e., he did not know why he was being directed to return to Honolulu, he was unable to find out, and there were many possible reasons, including a bomb threat, for the directions he had been given). Respondent had the burden of proving there was an emergency and that he acted reasonably in landing overweight rather than dumping excess fuel.

The law judge affirmed the complaint, holding that, although respondent believed there was an emergency, an emergency did not exist "to the degree as to excuse not having declared an emergency or assuring that an emergency had been declared on his behalf by dispatch . . . ." Tr. at 254. The law judge faulted respondent, not for operating beyond the aircraft's specifications, but for failing to declare an emergency so that the airport could properly prepare for what could have been an emergency crash landing.

On appeal, we reversed and dismissed the complaint. In brief, we found that respondent had a reasonable belief that Hawaiian Air dispatch had advised ATC of the situation and, therefore, there was no need for him separately to do so. We agreed with respondent's contention that an emergency could exist without him declaring it, and that, under the wording of the manual, he could rightly have considered the situation he was in as an emergency. We rejected the Administrator's argument that

this was not an emergency because immediate action was not required.

Under EAJA, fees will be awarded when, among other things, the government is shown not to have been "substantially justified" in pursuing its complaint. This, in turn, has been defined to mean that the government must show that its position is reasonable in fact and law. Application of US Jet, NTSB Order EA-3817 (1993).

Here, there is no question but that respondent had violated the aircraft manual in landing overweight. However, the inquiry could not end there. The Administrator was obliged not to pursue the matter if an emergency defense was reasonable, and he is required to pay fees and expenses if his pursuit of the case ignored established law or important facts available to him.[5]

Respondent contends that the Administrator was aware of his defense and improperly rejected it. The Administrator argues that respondent's failure to include the details of his emergency defense in his answer and his alleged failure to discuss certain

[5]According to the Administrator (reply to EAJA application at 3):

> The FAA initially evaluated the case based on whether we could meet our own burden of proof and whether the Respondent-Applicant could meet his burden of proof on the affirmative defense and on whether he acted reasonably under the circumstances.

We see no error in this approach, yet we see no point in the Administrator's urging that we give "due consideration" to the only issue in dispute being an affirmative defense. The issue remains whether the Administrator, in rejecting respondent's explanation, was acting reasonably based on the facts and the law.

of its specifics until the hearing precludes him now from arguing that the Administrator was not substantially justified.

The law judge appears to have accepted the claim that the Administrator was not on notice until the hearing that respondent planned to offer his emergency defense. For a number of reasons, we disagree. First, the record indicates that respondent advised the Administrator of the details of his defense as early as July 1989 (see attachment C to respondent's reply to the Administrator's response to the EAJA application), even before the December 17, 1990 informal conference. The Administrator must timely investigate whatever facts and argument respondent offers.

Second, as a matter of policy we look with considerable disfavor on the Administrator's argument that, for the purposes of EAJA, a respondent is required formally to assert a defense before the Administrator is required to investigate it, even though it is known to him. This approach would elevate form over substance by allowing the Administrator to ignore exonerating information. Under EAJA, the Administrator has a duty to discontinue his investigation or prosecution at any time he knows or should know that his case is not reasonable in fact or law, or be liable for EAJA fees for any further expenses applicant incurs. The Administrator was required to analyze, as more information became available to him, whether continued investigation and prosecution was reasonable. We categorically

reject the suggestion that the Administrator had no such duty.[6]

Third, even were the Administrator and the law judge correct, that would not resolve the matter. The reasonableness of the Administrator's behavior after he was fully apprised of respondent's defense would still be at issue. As the following discussion indicates, we would not find the Administrator substantially justified in proceeding any further.

In this case, we must address a set of circumstances where certain of the Administrator's conclusions and, therefore, his pursuit of the matter based on them, were reasonable. For example, although we disagreed with the Administrator in our ultimate conclusion and our weighing of the various factors regarding respondent's proper exercise of judgment, we do not think the substantial justification test intends to punish the government for arguing in a particular case that a pilot exercised poor judgment and losing that argument. Catskill Airways, Inc., 4 NTSB 799 (1983) (EAJA awards are intended to dissuade the government from pursuing "weak or tenuous" cases; the statute is intended to caution agencies carefully to evaluate their cases, not to prevent them from bringing those that have some risk).[7] Similarly, we would not award EAJA fees based on a

[6]As a matter of logic, this argument cannot stand, as it removes any obligation on the Administrator's part to investigate information provided by respondent until respondent either files an answer or leaves no doubt he will be asserting a particular defense.

[7]But in offering this generalization, we must note that the Administrator's argument that respondent exercised poor judgment in landing overweight rather than dumping fuel is undermined by

reasonably based and reasonably argued attempt by the Administrator to distinguish or overrule established case law. In this case, although there are aspects of the Administrator's case that might be found substantially justified, we are persuaded that, overall, his pursuit of respondent was not. The central premise of the Administrator's case was flawed.

Respondent contends, and there is no information in the record to support a different conclusion, that the FAA inspector who investigated this matter and who testified at the hearing misunderstood the applicable law and proceeded under that misunderstanding, without correction from FAA counsel. Inspector Matsumoto repeatedly testified that respondent was required to declare an emergency to ATC, and cited 14 C.F.R. 121.557 for this proposition. Tr. at 33. The other FAA witness, Inspector Woods, testified to a similar understanding. See Tr. at 108, 116.

No violation of § 121.557 was charged in the complaint. In any event, the language of that section does not require that the pilot declare to ATC that he is experiencing an emergency. Case law easily available to the Administrator establishes the opposite. See, e.g., Administrator v. Clark, 2 NTSB 2015 at note 8, as cited in Administrator v. Scott, NTSB Order EA-4003 (1993).

(..continued)
the FAA's own instructions on the matter, which do not require fuel dumping, do not clearly prefer it to overweight landings, and extend the greatest discretion to the pilot. NTSB Order EA-4003 at 7-8.

We are convinced from a review of the record and the hearing transcript that the FAA pursued this investigation under the theory that respondent was obliged to declare an emergency before availing himself of the emergency defense and that counsel did not adequately review whether this position was reasonable in law. See closing statement of counsel for the Administrator, Tr. at 221 ("It is our contention that [company procedures giving the pilot leeway in an emergency] did not become effective because he did not declare an emergency") and Tr. at 225 ("The fact that he chose to land without declaring an emergency is his responsibility as [pilot-in-command]").[8] Accordingly, although there might have been other approaches (argued or not) under which the Administrator might have been found substantially justified even if we disagreed with his conclusions, in this case we are persuaded that fees are in order because we are convinced that the FAA failed adequately to study applicable law and the relation of that law to the facts of this case.[9]

[8]On appeal, the Administrator disagreed with having made such an argument (see NTSB Order EA-4003 at footnote 5), but offered no other explanation for the above statements.

[9]Another aspect of the FAA's actions here confirms our concern that the FAA did not proceed as carefully as respondent is entitled in this case, and that is the Administrator's refusal to consider respondent's contention that his failure to declare an emergency was harmless because ATC already knew of the situation. Hawaiian Air dispatch had talked to ATC, and the same controller with which dispatch had spoken gave respondent his clearance to return. We see no reasonable basis in the record before us to conclude that Honolulu Airport was without information on which to prepare for respondent's return. Yet, there is no indication why ATC did not query him regarding an overweight landing or fuel dumping, nor is there any indication that ATC attempted to determine the reason for Hawaiian Air's

Respondent otherwise qualifies for an EAJA award. His net worth is within statutory limits, and he is a prevailing party, having had the case against him dismissed. The Administrator's response to the application challenged respondent's non-attorney representative's right to fees, alleged that the sought fees exceeded an authorized ceiling of $75/hour, and cited one itemized fee as excessive. (The Administrator's initial response in this regard confirms our prior conclusion regarding the depth of the Administrator's preparation.)

In reply to the respondent's appeal, the Administrator has departed from the above, erroneous arguments, and offered entirely new ones. He now claims, in extensive discussion and among other things, that fees may not be awarded for work done prior to the order of suspension; that expert witness fees sought are unlawfully excessive; and that respondent's representative's hours and hourly fee are excessive. Respondent should be given the opportunity to respond to these arguments.

(..continued)
ordering the aircraft to return.

ACCORDINGLY, IT IS ORDERED THAT:

1. The initial decision is reversed and the EAJA application accepted;

2. Applicant is directed to file any response to the Administrator's reply within 30 days from the service of this decision; and

3. This case is remanded to the law judge for a calculation of authorized fees and expenses.

HALL, Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.